SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-665

LEONARD J. CIACCIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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November 26, 1974

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The petitioner Leonard J. Ciaccio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Fourth Circuit entered in this proceeding on October 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The unreported memorandum opinion of the District Court for the District of Maryland appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 29, 1974. This petition for writ of certiorari was filed within 30 days of that date in accordance with Rule 22 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether knowing possession of a firearm has been proven beyond a reasonable doubt when people other than petitioner had regular access to that part of the business premises where the silencer was found and the government could produce no direct evidence to establish that petitioner knew the firearm was located on the premises.

2. Whether an uncorroborated statement of petitioner can be relied upon by the government to prove a material element of the offense of knowing possession.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

§5861. Prohibited Act

It shall be unlawful for any person

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter;

§5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more

than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

STATEMENT OF THE CASE

Procedural Background

Petitioner, Leonard J. Ciaccio, was indicted for possession of a firearm which was not registered to him and did not bear a serial number in violation of 26 U.S.C. §5861 (d) and (i). Petitioner waived a trial by jury and was tried by the Court on April 10-11, 1973.

On April 27, 1973, the trial judge (sitting without a jury) rendered an opinion (App. 217-225) and a verdict of guilty as to each of the two counts of the indictment. (App. 225). On August 10, 1973, the judgment of the Court, sentencing petitioner to four years of imprisonment on each count (to be served concurrently) was entered. (App. 2). A timely notice of Appeal was filed. The appeal was briefed and argued before the Court of Appeals for the Fourth Circuit. On October 29, 1974, the Court of Appeals affirmed petitioner's convictions. Petitioner subsequently filed a Motion for Stay of Mandate and on November 15, 1974, the Motion was denied.

Substantive Evidence

On May 18, 1971 at 10:00 P.M., agents of the Internal Revenue Service, led by Agent Acker of the Alcohol, Tobacco and Firearms Bureau conducted a raid on the premises of the Talk of the Town, a night club in Baltimore, pursuant to a "Warrant for Inspection and Examination." (App. 35)[1] Upon determining that the petitioner who identified himself as 75 percent owner of the club, did not have an occupational stamp as re-

[1] References to the Appendix refer to the Appendix submitted to the Court of Appeals for the Fourth Circuit.

quired by law, Agent Acker told petitioner to close the business so that an examination of the premises could take place. While Agent Acker checked the liquor bottles behind the bar, another agent, Special Agent Burns, conducted a shelf-by-shelf search of a walk in storeroom in which liquor and other supplies were kept. (App. 36). During the course of the search, Agent Burns discovered a metal box which he brought out to Agent Acker who opened it and discovered that it contained a gun. Upon inspecting it, Agent Acker noticed that the gun had an attachment with inside threading on the front of the barrel and suggested that Agent Burns might find a silencer around. (App. 36). Agent Burns searched further and discovered a brown paper bag on the top of the shelving near the ceiling containing a device which proved to be a silencer. (App. 37). It was stipulated at trial that the silencer was not registered to the petitioner (App. 147).

Agent Burns testified that the door to the storeroom where the silencer was discovered was unlocked at the time of the raid (App. 97-99). Agent Burns also testified that the petitioner told him that only he had access to the storeroom. (App. 103, 104, 107). But employees of the Night Club on both the day and night shifts testified that they frequently and regularly (at least on a daily basis) went into the storeroom without being accompanied by the petitioner. (App. 190-193, 208-211, 175-177, 184-187). In fact testimony disclosed that a day manager operated the club from 10 a.m. to 8 p.m. and that the petitioner was not normally at the club during that time. (App. 191). In discussing this evidence the District Court concluded that "the Defendant's statement must not be discounted; although, it would be unwarranted to conclude absolutely that only he had access to the vault." (App. 224).

Testimony at trial revealed that none of the agents conducting the examination of the premises made any attempt to interview any employees, delivery men, the day manager or other persons who might have had information concerning the operations of the bar or the concealment of the silencer. (App. 65-68). Moreover, the metal box in which the threaded gun was discovered was inexplicably lost without any attempt by the government to obtain fingerprints. (App. 50, 52-53, 88-89).

REASONS FOR GRANTING THE WRIT

I.

THE CONVICTION OF THE PETITIONER WAS SO TOTALLY DEVOID OF EVIDENTIARY SUPPORT THAT IT HAS EFFECTIVELY IMPOSED A FORM OF STRICT LIABILITY UPON PETITIONER FOR CONTRABAND FOUND ON HIS BUSINESS PREMISES IMPERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The cases decided under the heading of constructive possession have caused considerable confusion and given rise to so many conflicting rulings that Judge Tamm, concurring in *United States v. Holland,* 445 F.2d 701 (D.C. Cir.), criticized the doctrine for its vagueness and lack of inherent standards necessary for uniform judicial application:

> The rhetorical legerdemain compounded in this area of the law invokes abstractions which appear more designed to achieve a particular result in an individual case than to stabilize and formalize a workable index of objective standards. The more cases one reads on constructive possession the deeper is he plunged into a thicket of subjectivity. Successive cases enumerate a continuing reinterpretation which can only be described as judicial whimsy. To basic questions to which the answer should be "Always," judicial hairsplitting settles for a wavering "Sometimes."

> Confronted with a library of flexible abstractions, government and defense counsel alike must struggle, too often unsuccessfully, with a logically insoluble dilemma. The sum total of recorded cases can best be described as symbiotic. Both prosecutor and defendant's attorney present their cases with the unfortunate knowledge that the law of constructive possession is what we will say it is in our next opinion. 445 F.2d at 703-704.

It is petitioner's contention that, with the decision in the present case, the law of constructive possession has gone far beyond the result-oriented "thicket of subjectivity" described by Judge Tamm and has imposed a form of criminal strict liability for contraband items found on business premises in violation of constitutional limitations imposed by the Due Process clause of the Fifth Amendment.

When this Court originally considered the constitutionality of the newly enacted amendments to the National Firearms Act in *United States v. Freed*, 401 U.S. 601 it determined that the government was not constitutionally required to prove scienter before a person could be convicted under § 5861. But, in a concurring opinion, Justice Brennan made it clear that the government must still prove beyond a reasonable doubt the possession of an unregistered firearm was a knowing possession *i.e.* the defendant must know that he possessed certain items and that those items were firearms. In the absence of such proof, no criminal liability can attach to the fact of possession. 401 U.S. at 612. Cases decided since *Freed* have reiterated that the government must prove knowing possession in order for a conviction to withstand judicial scrutiny. *See, e.g. United States v. Davis*, 346 F. Supp. 405 (W.D. Pa.); *United States v. Stella*, 448 F.2d 522 (9th Cir.).

The requirement that criminal possession be a knowing or willing and conscious possession has been ignored by the District Court and by the United States District Court for the Fourth Circuit in the present case. Petitioner was arrested and convicted for possession of a contraband silencer discovered on the top shelf of the storeroom in his nightclub during a search of the premises by government agents. The government's case against the petitioner rested primarily on two things — petitioner's statement that he was 75 percent owner of the night club and petitioner's uncorroborated statement, allegedly made to a government agent during the search, that only he had control of and access to the storeroom. The District Court, in convicting petitioner of possession of the silencer, determined that it would be unwarranted to conclude that only petitioner had access to the vault based on evidence presented at trial that numerous employees of the night club on both the day and night shifts regularly and frequently went into the vault-storeroom without petitioner being present during their normal working hours. The District Court did, however, conclude that petitioner's access dominated, that he had control and the power to lock and unlock.

The conclusion of the District Court that petitioner had control over the vault-storeroom and had the power to lock and unlock rested, in the final analysis, on the fact that Petitioner was 75 percent owner of the premises where the silencer was found. The government failed to prove that the vault-storeroom was *ever* locked. Moreover, a government agent testified that the door of the storeroom was ajar at the time of the search which took place during working hours. No testimony was adduced to establish that the power to lock or unlock was anything but a theoretical power arising from the fact of ownership.

On the basis of the evidence presented at trial, petitioner contends that his conviction for possession of the silencer goes far beyond the permissible limits of the doctrine of constructive possession and is the direct result of a misapprehension on the part of the judicial system of the quantity and quality of proof necessary to convict a person of knowing possession in accordance with constitutional standards. Petitioner urges this Court to refuse to permit a finding of knowing possession against the owner of a business where his employees have regular and frequent access to that part of the business premises (storeroom, warehouse, etc.) where a contraband item is discovered. Unless there are other circumstances tending to show knowledge on the part of the owner of the presence of contraband on the premises, the owner of those premises should not be convicted of possession of the contraband because to do so in the absence of such proof would be to make ownership of the premises the determinative factor.

Predicating criminal liability on ownership of the business even when coupled with evidence of some degree of access to and control of the area in question would place an insurmountable burden upon the owner of a business. It would permit an employee to stash the contraband while at work and be perfectly assured that not only will his access to the contraband continue so long as he remains at his employment but also allows the employee to transfer the risk of being charged with possession of the item to his unwitting employer as long as no one sees him hide the "goods". This is an impermissible extension of the concept of criminal possession since it effectively transfers the burden of proof to the owner of the business premises to prove that someone else placed the contraband on his property even where the facts as proven allow for the reasonable

possibility that a number of employees could have put the contraband there without his knowledge. Such an extension would impose a form of strict liability on the owner of a business whenever a contraband item is found on some part of his business premises and there is no evidence to connect a specific person with the item.

The substantial need for defining standards in the area of constructive possession where a number of people have access to the property or premises on which contraband is found justifies the grant of certiorari to review the judgment below.

II.

THE INADEQUACIES IN THE GOVERNMENT'S INVESTIGATION OF THIS CASE MUST NOT BE COMPOUNDED BY PERMITTING PETITIONER'S CONVICTION TO REST ON HIS UNCORROBORATED EXTRAJUDICIAL STATEMENTS.

A defendant's extrajudicial statements made subsequent to an alleged crime which are used to prove essential elements of the crime with which he is charged must be corroborated. *Opper v. United States*, 348 U.S. 84, *Smith v. United States*, 348 U.S. 147. The corroborative evidence need not be sufficient, independent of the statements themselves, to prove the element of the crime with respect to which the statement were introduced. *Opper, supra* at 93. The government must, however, present *substantial independent* evidence which would tend to establish the trustworthiness of the statements. *Opper, supra* at 93, *Smith, supra* at 156.

In the present case, the government was required to corroborate petitioner's statement that he had sole access and control over the storeroom. The statement was elicited by Special Agent Burns after the silencer was found and after a violation of 26 U.S.C. §5861 was determined to exist. It was used to supply a vital and

material element of the government's case since it was imperative that the government establish petitioner's control and access to the storeroom. A finding of knowledgable possession of the silencer in this case had to be predicated on an inference arising from proof that petitioner owned the premises and had access to and control of the storeroom where the silencer was found. Yet, this case represents a blatant failure on the part of the government to supply substantial extrinsic evidence required as corroboration by *Smith v. United States*, 348 U.S. 147 and *Opper v. United States*, 348 U.S. 84.

In a situation where the cards are as stacked against a defendant as they are in cases involving constructive possession, this Court must not condone a failure on the part of the government to prove all elements of an offense in a procedurally fair and just manner. This case is fraught with governmental missteps. No person other than petitioner was questioned (App. 65-68). Potentially exculpatory evidence was lost (App. 50, 52-53, 88-89). The government must not be permitted to compound error by supplying a material element of the offense from evidence of petitioner's own uncorroborated statements.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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November 26, 1974

APPENDIX A

United States Court of Appeals
For The Fourth Circuit

No. 73-2180

United States of America,

Appellee,

versus

Leonard J. Ciaccio,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued September 30, 1974
Decided October 29, 1974

Before CRAVEN, BUTZNER and FIELD, Circuit Judges

Marvin J. Garbis (Allen L. Schwait, Garbis and Schwait on brief) for Appellant; Kirby W. Patterson, Attorney, United States Department of Justice, (George Beall, United States Attorney, and Peter M. Shannon, Jr., Attorney, United States Department of Justice on brief) for Appellee.

PER CURIAM:

An indictment in two counts charged Leonard J. Ciaccio with possession of a firearm not registered to

him in violation of 26 U.S.C. § 5861 (d) and possession of a firearm not identified by a serial number in violation of 26 U.S.C. § 5861 (i). Waiving a jury trial, he was tried to the court and convicted on both counts. The two issues raised by Ciaccio on this appeal are (1) the sufficiency of the evidence and (2) the failure of the district court to suppress certain evidence.

Upon careful consideration of the record, the briefs and the oral arguments of counsel, we discern no reversible error and the convictions are affirmed.

AFFIRMED.

APPENDIX B

In The United States District Court
For The District Of Maryland

Criminal No. 72-0307-Y

United States of America

v.

Leonard J. Ciaccio

ORAL OPINION RENDERED APRIL 27, 1973

(The Court) On May 18th, 1971, Special Agent Raymond Acker, Assistant Group Supervisor of the Baltimore Office of the United States Internal Revenue Service's Bureau of Alcohol, Tobacco and Firearms, headed a general inspection of "The Talk of the Town," a nightclub on North Gay Street in Baltimore. At approximately 10:00 p.m., or thereabouts, on that date, Agent Acker, accompanied by four other agents, entered the nightclub with the purpose of making a general examination of liquor and records in order to

evaluate compliance with federal law. He encountered Defendant Ciaccio and informed him of this and ascertained that Ciaccio was the proprietor and operator of the establishment. Defendant does not dispute his seventy-five per cent ownership interest and stockholding in the company.

After about an hour, during which time, according to the testimony of Acker and Special Agent Albert M. Burns, the cash registers and open whiskey bottles at the bar were checked, the bar area secured, and the house lights turned on. Special Agent Burns proceeded to a room-size walk-in vault in the rear of the club, which appeared to be and actually was a storage area. During the course of a shelf-by-shelf search, he found a green cash box. He brought this out to Agent Acker. Upon opening it, they discovered, wrapped in a cloth or a pouch, a .32 Automatic Pistol, a clip, threaded attachment, and some ammunition.

Upon return to the vault and subsequent search, Agent Burns found approximately twenty minutes later, on the top shelf, behind a typewriter or calculating machine, a brown paper bag. Inside the bag was a cylindrical object, shaped like a typewriter roller, which Agent Burns suspected might be a silencer.

Again, bringing his discovery to Agent Acker, they found that the cylinder fit perfectly on the attachment of the pistol and, at this time, determined that a violation of the firearms laws had, in their opinion, occurred.

Agent Burns apprised Defendant Ciaccio of the presence of the pistol and silencer, informed the Defendant of his rights. After Defendant indicated that he knew of his rights and was perfectly willing to answer questions, he was interrogated by Agent Burns. At that time, a questionnaire form was used in the interrogations, and while counsel for the Defendant has pointed to some ambiguities in the question-answer summary relating to Defendant Ciaccio's statement, that it was necessary to have trust in personnel employed by him, it seems clear that Mr. Ciaccio stated

that only he locked and unlocked the vault and had control or access to it.

Agent Burns testified that Defendant Ciaccio said all cash and liquor stock was kept in the vault, and that the day people — those people working during the daytime — would work from the stock on hand at the bar and cash on hand in the register. There is a direct conflict between this evidence and evidence later adduced from the testimony of several employees of the club.

The issue of access and control are crucial issues in the case, the defense being basically that Mr. Ciaccio did not possess the firearm. Expert examination by James B. Cain, of the Bureau of Alcohol, Tobacco and Firearms Division, reveals that the cylinder was a hand-made silencer which perfectly fit the Colt and effectively reduced its decibel level, as was demonstrated demonstratively in Court. There is no dispute concerning the check of the records of the Government, which show no registration, nor, is there any dispute of the absence of a serial number.

Agent Burns noted that the vault door was ajar when he entered, and there has been testimony from several employees that the vault was usually unlocked in order that the bartenders or day manager might have access to the stock. Employees Jacob Cohen, Vito Scimeca and Ernest Pugh, whose work spanned the night shift, during which time Defendant was in charge, and the day shift, during which time Defendant employed a day manager, testified generally that they would enter the vault alone or with delivery men.

One witness, salesman Rudolph Torell, also testified that he entered the vault on occasion in the company of the day manager. It also appears from Agent Burns' testimony that the green cash box, unlike the paper bag in which the silencer was found, and unlike just about everything else in the vault, was free from dust. It does appear that the cash box and pistol had been placed there or used recently.

Counsel for the defense also stressed several alleged deficiencies in the general investigation.

It appears that a clerical error was made in the calculating of the value of the property seized in the raid, and upon examination, it does appear that a check had been inadvertently listed as cash. It does appear that the actual discrepancy between the receipt given to the Defendant and the value actually returned is less than a dollar.

More serious is the fact that the green cash box disappeared from the Government property room and has not been located. It is conceivable, of course, that fingerprints might have been found.

It is also true that there might have been a somewhat more thorough investigation following the discovery of the silencer. Apparently, after the statement was taken from Defendant Ciaccio relating to his control of the safe, the agents did not feel it necessary or warranted to question anyone else concerning possession of the firearm. Questioning of the employees would have been preferable.

This Court is, however, constrained to decide the case upon the evidence presented. That the Government might have done a better job, is not, in itself, proof of innocence.

In discussing the concept of "possession" in the criminal law, the Ninth Circuit had this to say, and I quote from *Rodella v. United States,* 286 F.2d 306, at page 312, as decided in 1960: "There is no question in our mind that a person should be held to be in possession of an object if that object, even though not in his manual or personal physical possession, is, for example, in his home, behind locked doors, and within a safe therein, to which home and safe the person has access and makes no explanation as to how or why he has such control. Likewise, we see no reason why an object cached by a person or his operative or agent in a certain spot on deserted land, not owned by him, perhaps located ten miles from the nearest highway, house,

habitation, or person, could not be deemed in law within that person's possession, there being no explanation. While there might be a difference of opinion, in either case, as to whether such possession was actual or constructive, such possession could be proved either by direct or circumstantial evidence."

Accordingly, a number of Courts have sustained convictions based on possession of narcotics or firearms found in automobiles owned or occupied by defendants, despite their possible replacement by other persons.

I refer to the case of *Eason v. United States*, 281 F.2d 818 (Ninth Circuit, 1960), *Hill v. United States*, 294 F.2d 563 (Eighth Circuit, 1961), *United States v. Shephard*, 439 F.2d 1392 (First Circuit, 1971). But see *Guevara v. United States*, 242 F.2d 745 (Fifth Circuit, 1957), a case which this Court finds readily distinguishable involving an automobile left unlocked on a city street prior to the arrest of the defendant, who was the owner of the vehicle. A study of reported cases revealed that each case necessarily turns on its own facts, and that an exact operational definition of "possession" is elusive. Quoting *United States v. Holland*, in the concurring opinion of Judge Tamm, 445 F.2d 704.

To illustrate, in a recent case having some similarity, the Third Circuit sustained the conviction of the sole tenant of an apartment who testified her ignorance of the mixing and packaging of heroin in her kitchen while she was preparing dinner, the citation of which is the *United States v. Davis* at 461 F.2d 1026. Appellant there testified that one, Gloria Anderson, who was mixing and packaging the substance which was unknown to the appellant, was a friend of her father, staying at the apartment temporarily while searching for a more permanent residence. Judge Rosen distinguished cases of "mere proximity to the drug, or mere presence on the property where it is located, or mere association with the person who does control the drug or the property." Implicit in the Court's affirmance was the strong consideration that this was the appellant's own apartment. While her proximity to Gloria Anderson can be con-

strued as stronger evidence of possession than in the present case, the conclusion in *Davis* is suggestive of the importance of ownership and control of the premises.

It is also noteworthy that the present case does not fall within the bounds of situations held insufficient to support a finding of possession, such as Judge Rosen distinguished.

I refer to *Arellanes v. United States*, 302 F.2d 603, and the *United States v. Mills*, 293 F.2d 609.

The Court is not unmindful of a Philippine case relied upon by Defendant in the case of *U. S. v. Jose and Tan Bo*, reported in the 34 Philippine Reports, 723, decided in 1916.

Although indebted to counsel's ingenuity and exhaustive research, the Court is not inclined to rely upon the Philippine authority when more familiar authorities are available.

Further, a factual distinction between that case and the instant case is obvious, for in the Philippine case, the revolver was found in a secret hiding place in the store itself, and not, as here, in a vault-like room, with the resultant strong inference of possession and control.

The evidence discloses a difference of opinion as to the operation of the bar, especially during the day shift, and the access of employees to the vault. Defendant's statement must not be discounted; although, it would be unwarranted to conclude absolutely that only he had access to the vault. It is clear that Defendant's access dominated, that he had control and the power to lock and unlock. It is, furthermore, reasonable to infer that the owner of a bar would keep a gun for the purpose of defense of self and property in a vault over which he has sole control and responsibility, rather than that an employee would deliberately secret a gun at the risk of losing substantial control of it.

All of these facts point to possession. The recent use of the cash box containing the gun, and perfect fit of

the Colt with the hand-made silencer, add to persuade this Court that beyond a reasonable doubt, that Defendant possessed the gun and silencer, the latter a firearm requiring registration and serial number under the Federal Firearms Law, Section 26, United States Code, Section 5854, 5861(d) and (i).

For the foregoing reasons, the Court finds the Defendant guilty under counts one and two, as charged in the indictment.

* * * * * *